89-1064

No. _____

Supreme Court, U.S.
FILED
DEC 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

DAVID NEIL,

Petitioner,

v.

ANDREW ESPINOZA, JEANNIE ESPINOZA, JUDITH ESPINOZA, ARTHUR ESPINOZA, JR., BARRY ESPINOZA, and BEVERLY ESPINOZA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF COLORADO

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December 26, 1989

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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QUESTIONS PRESENTED

1. Whether the Supremacy Clause or the Privileges or Immunities Clause, or both, require preemption of state appellate procedures that preclude a public official from exercising his federal substantive right to appeal prior to trial a denial of his immunity from a claim under 42 U.S.C. § 1983.

2. Whether respondents had a clearly established constitutional right of association with the decedent so as to defeat petitioner's qualified immunity.

3. Whether a state court is required to apply the law of the federal circuit in which it sits when determining what constitutes clearly established law for purposes of deciding immunity from a § 1983 claim.

LIST OF PARTIES

In addition to the parties set forth in the caption, the following party is also involved in the case below:

City and County of Denver, Colorado

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No. _____

In The

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DAVID NEIL,

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ANDREW ESPINOZA, JEANNIE ESPINOZA, JUDITH ESPINOZA, ARTHUR ESPINOZA, JR., BARRY ESPINOZA, and BEVERLY ESPINOZA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF COLORADO

Petitioner respectfully prays that a writ of *certiorari* issue to review the order of the Court of Appeals for the State of Colorado denying appellate jurisdiction for pretrial review of a denial of immunity.

OPINIONS BELOW

The Court of Appeals for the State of Colorado refused to review a pretrial denial of a public official's qualified immunity from a claim under 42 U.S.C. § 1983

on grounds it was without jurisdiction to do so. The order is found in Appendix A.

JURISDICTION

On March 27, 1989, petitioner appealed to the Colorado Court of Appeals from the trial court's pretrial denial of his qualified immunity from a § 1983 claim. The Court of Appeals issued an order to show cause as to why it had jurisdiction over an interlocutory appeal; thereafter, on June 16, 1989, it dismissed the appeal for lack of a final, appealable judgment. That court then denied a petition for rehearing on June 30, 1989. Thereafter, petitioner applied to the Supreme Court for the State of Colorado seeking *certiorari* review. That court denied review on October 2, 1989. This Petition for Certiorari is filed within 90 days of that date.

The jurisdiction of this Court to review the order of the Colorado Court of Appeals is invoked under 28 U.S.C. § 1257.

This Court has previously dismissed *certiorari* in this case after oral argument because there was no "final judgment" under 28 U.S.C. § 1257. *See O'Dell v. Espinoza*, 456 U.S. 430 (1982). However, this matter is again before this Court on "an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). Jurisdiction arises because immunity is an entitlement not to stand trial under certain circumstances, a denial of which is granted pretrial, appellate review. *Id.*, at 525-26.

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

42 U.S.C. § 1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1988: The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all person in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended and govern the said courts in the trial and disposition of the cause . . . .

Amendment Fourteen, § 1: . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . .

STATEMENT OF THE CASE

The claims herein arise from the shooting death on July 30, 1977, of Arthur Espinoza (respondents' decedent) by petitioner, Denver police officer David Neil. Respondents, consisting only of decedent's six children, assert personal claims under 42 U.S.C. § 1983 based solely on the denial of their purported constitutionally protected right to associate with decedent—decedent's constitutional right to life is not implicated.

The following facts are essentially uncontradicted, as presented to the trial court in a motion for summary judgment (as cited in Petitioner's Reply Brief with record citations filed in the trial court) and are derived exclusively from trial testimony in this matter:

The events began with a call to the Denver Police Department regarding a family fight at decedent's residence. The officers further understood that decedent was wanted regarding a possible homicide and that he had a gun. Responding officers, including petitioner, eventually located decedent in a park near decedent's home. As two plainclothes detectives (non-parties herein) entered the park on foot, they observed decedent and his companion, James Hinojos, lying on the ground and further observed decedent pass a gun to Hinojos. Petitioner, in uniform, arrived separately at the scene driving a marked police car to within a few feet of decedent and Hinojos, just as

the detectives began shooting at Hinojos. Petitioner opened his car door, took aim behind it and fired once at decedent because he believed decedent was at that time reaching for a gun tucked in his waistband. This single shot fired by petitioner caused decedent's death.

Respondents originally brought various claims, including § 1983 claims, against petitioner, the two detectives (John O'Dell and Gary Graham) and the City and County of Denver. At that time the trial court granted a motion to dismiss the § 1983 claims. The Colorado Supreme Court reversed in *Espinoza v. O'Dell*, 633 P.2d 455 (Colo. 1981), recognizing a constitutionally protected right of association to which this Court granted *certiorari*. *O'Dell v. Espinoza*, 454 U.S. 1122 (1981). After oral argument, this Court dismissed for want of jurisdiction. 456 U.S. 430 (1982). The case was remanded for trial, after which judgment was rendered against petitioner. On appeal from that judgment, the Colorado Supreme Court reversed and remanded for a new trial. *See Neil v. Espinoza*, 747 P.2d 1257 (Colo. 1987).

Petitioner then moved in the trial court for summary judgment on the basis of his qualified immunity, contending (1) that respondents' associational rights were not clearly established at the time of the incident; (2) that assuming such rights clearly existed, respondents could demonstrate no evidence of a specific intent to interfere with those rights, as required by the Tenth Circuit in *Trujillo v. Board of County Commissioners*, 768 F.2d 1186, 1190 (10th Cir. 1985); and (3) petitioner's actions were objectively reasonable as a matter of law under the test set forth in *Anderson v. Creighton*, 483 U.S. 635 (1987), and consistent with the principles delineated by this Court in

Graham v. Connor, 490 U.S. ___, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

The trial court denied petitioner's summary judgment motion and, after timely appeal, the Colorado Court of Appeals issued an order to petitioner to show cause why the appeal should not be dismissed for lack of a final, appealable judgment. In response thereto, petitioner asserted that under *Mitchell v. Forsyth, supra*, he possessed a substantive right to a pretrial appeal of the denial of his qualified immunity. In addition, petitioner asserted that a denial of his right to pretrial appeal would abridge the Supremacy Clause, the Due Process Clause, the Equal Protection Clause and the Privileges or Immunities Clause. The Court of Appeals dismissed the appeal pursuant to the order to show cause (Appendix A). The Colorado Supreme Court denied *certiorari* on October 2, 1989 (Appendix B).

REASONS FOR GRANTING THE WRIT

Courts Are Split Regarding Right to Pretrial Appeal In State Court.

This Court's instruction is needed because the state courts are split on whether a denial of immunity from a § 1983 suit filed in state court is immediately appealable. The four States which follow *Mitchell* are New Hampshire, Massachusetts, Arkansas and Minnesota. *See Richardson v. Chevrefils*, 131 N.H. 227, 552 A.2d 89 (1988); *Breault v. Chairman of Board of Fire Commissioners*, 401 Mass. 26, 513 N.E.2d 1277, *cert, denied*, 108 S.Ct. 1078 (1987); *Robinson v. Beaumont*, 291 Ark. 477, 725 S.W.2d 839

(1987); and *Anderson v. City of Hopkins*, 393 N.W.2d 363 (Minn. 1986).

The five States which do not follow *Mitchell* are Illinois, Texas, Ohio, Colorado and Kentucky. *See Pizzato's Inc. v. City of Berwyn*, 523 N.E.2d 51 (Ill.App. 1988), *cert. denied*, 109 S.Ct. 1315 (1989); *Noyola v. Flores*, 740 S.W.2d 493 (Tex.App. 1987); and *Ohio Civil Service Employees Ass'n v. Moritz*, 39 Ohio App. 3d 132, 529 N.E.2d 1290 (1987); *see also Stryker v. Decker, cert. denied*, 109 S.Ct. 3247, 106 L.Ed.2d 594 (1989), from unpublished order of the Colorado Court of Appeals; *Swain v. Lindsey, cert. denied*, 109 S.Ct. 1343, 103 L.Ed.2d 812 (1989), from unpublished order of the Kentucky Court of Appeals; and *Ansell v. Shannon, cert. denied*, 109 S.Ct. 492, 102 L.Ed.2d 529 (1988), from unpublished order of the Colorado Court of Appeals.

By denying petitioner the right to pretrial appeal of the denial of his immunity, the court below violated the Supremacy Clause which preempts state procedures that infringe federal rights, including the substantive right to immunity as discussed in *Mitchell*, 472 U.S. at 525-26. This Court has recently held that a State may not apply a notice of claim provision (applicable to state torts) to a § 1983 claim when the notice of claim provision could not be applied against a § 1983 claim asserted in that State's federal court. *Felder v. Casey*, ___ U.S. ___, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988). In so holding, this Court recognized that the equal protection doctrine applicable in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938), applied in the reverse context:

> Just as federal courts are constitutionally obligated to apply state law to state claims [citation

> omitted], so too the *Supremacy Clause imposes on state courts a* constitutional duty "to proceed in such manner that *all substantial rights of the parties under controlling federal law [are] protected.*"

Felder, 108 S.Ct. at 2313 (emphasis added). Because, as pointed out in *Mitchell*, immunity is a substantial right of a party in defense of a § 1983 claim, the state court is required under the Supremacy Clause to protect that right. The general principle in *Felder*, which concerned the substantive right of a *plaintiff*, applies with equal force to a civil *defendant* to ensure that his rights are not controlled by the whim of the plaintiff in choosing the forum in which to assert his federal claim.

Furthermore, the Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges *or immunities* of citizens of the United States . . . (emphasis added). The Privileges or Immunities Clause was first discussed in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). The opinion therein, and cases following, concerned solely "privileges"; neither this Court nor any other court to petitioner's knowledge has interpreted the phrase "or immunities" as that phrase stands alone, even though the tradition of immunity was firmly rooted in the common law at the time § 1983 and the Fourteenth Amendment were enacted. *See Owen v. City of Independence*, 445 U.S. 622, 637 (1980).

The legislative history of the Civil Rights Acts demonstrates that the post-bellum Congress understood that the term "immunity" meant then what it does today:

> But what of the term "immunities?" What is an immunity? Simply "freedom or exemption from

> obligation;" an immunity is "a right of exemption only," as "an exemption from serving in an office, or performing duties which the law generally requires other citizens to perform." This is all that is intended by the word "immunities" as used in this bill.

Cong. Globe 39th Cong., 1st Sess. (1866), at 1117. Hence this Court's instruction in *Mitchell* that immunity is an entitlement to be free from a particular burden, the burden of trial, is consistent with the Fourteenth Amendment's original meaning.

The *Slaughter-House Cases* instruct that privileges or immunities "have always been held to be the class of rights which the State governments were created to establish and secure." 83 U.S. at 76. The State of Colorado has specifically recognized the common-law right of qualified immunity in *Cooper v. Hollis*, 42 Colo.App. 505, 600 P.2d 109, 111 (1979), and has enacted a corresponding statutory right based upon the common-law principle that immunity is a defense to suit, not merely a defense to liability. *See* the legislative history to Colorado's Governmental Immunity Act in *Report to the Colorado General Assembly: Governmental Liability in Colorado*, Colorado Legislative Council, research publication no. 134 (November 1968), at xviii, 20 and 24-25. As the *Slaughter-House Cases* made clear, the right must be one initially recognized by the State. This principle is analogous to cases involving an alleged deprivation of a property interest in an employment context: once a State recognizes an expectation of continued employment, a federal court may intervene and determine whether due process was granted in terminating such employment. *See, e.g., Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538

(1985). The same principle applies herein: once the State recognizes the common-law right of immunity this Court may ensure that that right is protected under the Privileges or Immunities Clause.

In addition, the entitlement to immunity is fundamental (a prerequisite under the *Slaughter-House Cases* for protection under the Privileges or Immunities Clause, *see* 83 U.S. at 76) as measured by the fact that immunity arises from the earliest traditions of the common law. Consequently, petitioner's immunity asserted herein, recognized by the earliest traditions of the common law and by the State, satisfies those requirements of the *Slaughter-House Cases* and is a right of constitutional character subject to constitutional protection.

Courts Are Split Regarding Recognition Of A Constitutionally Protected Right Of Association.

This petition also raises substantive, as well as procedural, questions of first impression for this Court concerning petitioner's immunity, to wit, whether respondents' asserted constitutionally protected right of association with their father was clearly established at the time of the incident.[1] The only reported case considering

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[1] This Court has twice previously dismissed *certiorari* on grounds unrelated to the merits regarding the issue of whether a constitutionally protected liberty interest in the continued association with a family member shot dead by a police officer existed in the surviving family member. *See O'Dell v. Espinoza*, 456 U.S. 430 (1982), and *Jones v. Hildebrant*, 191 Colo. 1, 550 P.2d

(Continued on following page)

this issue in the context of resolving a question of immunity is *Sharpe v. City of Lewisburg*, 677 F.Supp. 1362, 1369 (D.Tenn. 1988) (immunity granted because existence of liberty interest between relatives for purposes of a § 1983 wrongful death-type claim was not clearly established at time of incident).

As mentioned above, it was in the instant case that the Colorado Supreme Court first recognized a constitutionally protected liberty interest in the surviving family member as the basis for suit herein, *Espinoza*, 633 P.2d at 463. However, the federal circuit courts and state courts are strongly divided as to whether a constitutional right of association between family members exists in the first instance for purposes of a § 1983 action. *See* cases not recognizing right: *Harpole v. Arkansas Department of Human Services*, 820 F.2d 923, 928 (8th Cir. 1987) (grandparent has no protectable interest under the Fourteenth Amendment); *Ortiz v. Burgos*, 807 F.2d 6, 7 (1st Cir. 1986) (stepfather and siblings have no protected liberty interest); *Ealey v. City of Detroit*, 144 Mich.App. 324, 375 N.W.2d 435, 441 (1985), *cert. denied*, 479 U.S. 931 (1986) (parents have no protected right in life of adult child); and *Ascani v. Hughes*, 470 S.2d 207, 212 (La.App.), *cert. denied*, 474 U.S. 1001 (1985) (no constitutionally protected interest between siblings); *see* cases recognizing right: *Smith v. City of Fontana*, 818 F.2d 1411, 1419 (9th Cir.), *cert.*

(Continued from previous page)

339, *cert. granted*, 429 U.S. 1091 (1976), *cert. dismissed*, 432 U.S. 183 (1977). This issue upon which this Court previously granted *certiorari* is germane herein insofar as its resolution is necessary to determine whether the law controlling petitioner's conduct was clearly established for purposes of the immunity inquiry.

denied 108 S.Ct. 311 (1987) (children have protected liberty interest in relationship with parent); *Trujillo v. Board of County Commissioners*, 768 F.2d 1186, 1190 (10th Cir. 1985) (mother and sibling have liberty interest right of association with decedent, but recovery narrowly limited to circumstances described in *Ortiz*, supra); *Estate of Bailey v. County of York*, 768 F.2d 503, 505 (3rd Cir. 1985) (father allowed to sue social services who allegedly caused death of his child); *Grandstaff v. City of Borger*, 767 F.2d 161, 172 (5th Cir. 1985), *cert. denied*, 480 U.S. 916-17 (1987) (without discussing father's particular constitutional right, court allowed father to collect damages for loss of society regarding his son); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1243 (7th Cir. 1984) (father and siblings have protected liberty interest with decedent under Due Process Clause); *Mattis v. Schnarr*, 547 F.2d 1007, 1017 n.22 (8th Cir. 1976), vacated as moot *sub. nom.* on other grounds, *Ashcroft v. Mattis*, 431 U.S. 171 (1977) (recognizes fundamental due process right to parenthood); and *Espinoza*, 633 P.2d at 463 (liberty interest recognized).

The State Court Must Follow Law Of Its Federal Circuit.

Finally, a further issue of first impression for this Court is presented: whether 42 U.S.C. § 1988 requires the state court to follow federal precedent established by the federal circuit in which it sits regarding federal claims brought in state court. *See Neil*, 747 P.2d at 1264-65, where a dissenting Colorado Supreme Court justice specifically addressed this issue (which the majority did not consider because it reversed on other grounds) by asserting that

she would not follow the federal precedent established in the Tenth Circuit.

Thus, without intervention by this Court, petitioner would lose his right to qualified immunity solely because this case arose not in Colorado's federal district court but in its state court. This is because respondents concede they cannot prove that petitioner violated clearly established law as established by the Tenth Circuit because there is no evidence petitioner intended to interfere with the specific associational rights existing between respondents and decedent. *See Trujillo*, 768 F.2d at 1190. Petitioner does not have qualified immunity against the same claim arising in Colorado's state district court, *see Espinoza*, 633 P.2d at 463, because the State apparently does not recognize that proof of intent is a necessary element to establishing respondents' § 1983 claim.

Thus, state courts need instruction as to whether § 1988, which provides that a § 1983 action "shall be exercised and enforced in conformity with the laws of the United States," requires conformity of substantive law in the two systems. If such reverse-*Erie* rule does not apply, then the same evil discussed in *Felder* and *Erie* will occur herein: whether petitioner is immune depends *solely* upon the choice of forum respondents have made.

CONCLUSION

For these various reasons, this petition for *Certiorari* should be granted.

It is clear this petition raises complex matters of federalism requiring the intervention of this Court. First, if state courts are allowed to violate the Supremacy Clause by applying their own rules in derogation of substantive rights recognized by federal courts, § 1983 defendants will be compelled to remove *all* § 1983 actions to federal courts to insure that their rights are protected. *See* Welch, *Qualified Immunity & State Torts*, 8 Rev. of Litigation 53, 65 (1988). Wholesale removals will further clog the federal courts and defeat the policy of promoting state court jurisdiction of § 1983 claims. Second, this Court must establish whether immunity, given its long-standing history, is granted constitutional protection under the Privileges or Immunities Clause. Third, this Court must determine whether Respondents' rights were clearly established so as to defeat Officer Neil's immunity. Finally, this Court must determine if § 1988 requires state courts to apply the federal substantive law from its federal circuit to § 1983 claims brought in state court.

Respectfully submitted,

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Co-Counsel for Petitioner

APPENDIX A

COLORADO COURT OF APPEALS

No. 89CA0688

ANDREW ESPINOZA, individually as an heir and also as Executor of the Estate of Arthur Espinoza, deceased; JEANNIE ESPINOZA, JUDITH ESPINOZA, ARTHUR ESPINOZA, JR., BARRY ESPINOZA, and BEVERLY ESPINOZA, individually and as heirs-at-law of ARTHUR ESPINOZA,	ORDER TO SHOW CAUSE
Plaintiffs-Appellees,	Trial Court No. C-75784
v.	
DAVID NEIL (a police officer for the City and County of Denver),	
Defendant-Appellant,	
and	
Defendant.	

TO: David Neil and his attorneys, Theodore S. Halaby and Robert M. Liechty

From the notice of appeal filed by appellant and the register of actions submitted by the clerk of the district court, it appears that on March 27, 1989, the trial court, ruling from the bench, denied defendant's motion for summary judgment. It further appears that the court's March 27, 1989, order did not adjudicate the rights and liabilities of all of the parties, and that issues remain pending in the trial court. There is no indication that the

court has certified its order as final pursuant to C.R.C.P. 54(b).

It also appears that the court has not signed, dated, and entered a written order reflecting its March 27, 1989 determination. Therefore, it appears that there may not be a final, appealable judgment in this case. *See* C.R.C.P. 58(a), as amended; C.R.C.P. 54(b).

IT IS THEREFORE ORDERED that appellant shall show cause, if any he has, in writing on or before *June 13, 1989*, why this appeal should not be dismissed without prejudice for lack of a final, appealable judgment.

BY THE COURT
Dated: May 30, 1989
Copies to: Counsel of Record

* * *

APPEAL DISMISSED

June 16, 1989

Having considered the response, it is ORDERED that the appeal is dismissed without prejudice

By the Court
Sternberg, J.
Tursi, J.
Fischbach, J.
Colorado Court of Appeals

APPENDIX B

SUPREME COURT, STATE OF COLORADO
Case No. 89SC405
Certiorari to the Colorado Court of Appeals 89CA0688
Denver District Court C-75784

ORDER OF COURT

DAVID NEIL,

Petitioner,

v.

ANDREW ESPINOZA, individually as an heir and also as Executor of the Estate of Arthur Espinoza, deceased; JEANNIE ESPINOZA, JUDITH ESPINOZA, ARTHUR ESPINOZA, JR., BARRY ESPINOZA, and BEVERLY ESPINOZA, individually and as heirs-at-law of ARTHUR ESPINOZA,

Respondents.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, OCTOBER 2, 1989.

JUSTICE ROVIRA would grant as to the following issue:

Whether a denial of a claim of qualified immunity brought pursuant to 42 U.S.C. § 1983, mandates appellate review prior to trial.

JUSTICE KIRSHBAUM does not participate.

Supreme Court, U.S.
FILED
JAN 24 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

1990

DAVID NEIL, Petitioner, vs. ANDREW ESPINOZA, individually and as an heir and also an Executor of the Estate of Arthur Espinoza, deceased; THE ESTATE OF ARTHUR ESPINOZA, DECEASED; JEANNIE ESPINOZA, JUDITH ESPINOZA, ARTHUR ESPINOZA, JR., BARRY ESPINOZA, and BEVERLY ESPINOZA, individually and as heirs-at-law of ARTHUR ESPINOZA Respondents.	)	No. 89-1064

RESPONSE TO PETITION FOR WRIT OF CERTIORARI UNDER SUPREME COURT RULE 15

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January 24, 1990

QUESTIONS PRESENTED FOR REVIEW

1. Whether police defendants in 42 U.S.C. § 1983 civil rights cases arising out of fatal shootings have an automatic right to an interlocutory appeal upon denial of meritless motions for summary judgment based on "qualified immunity"?

2. Does a police officer employed by a municipality have "qualified immunity" from suit under 42 U.S.C. § 1983 as a matter of law, when he shoots and kills an unarmed, intoxicated citizen?

3. Whether the constitutional right to life was "adequately established" before July 30, 1977, so as to make actionable under 42 U.S.C. § 1983 a police officer's actions in shooting to death an unarmed man, as he lay intoxicated in a Denver park?

PARTIES

The City and County of Denver, Colorado, is also a party.

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IN THE

SUPREME COURT OF THE UNITED STATES

1990

DAVID NEIL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 89-1064
	)	
ANDREW ESPINOZA, individually and as an heir and also an Executor of the Estate of Arthur Espinoza, deceased; THE ESTATE OF ARTHUR ESPINOZA, DECEASED; JEANNIE ESPINOZA, JUDITH ESPINOZA, ARTHUR ESPINOZA, JR., BARRY ESPINOZA, and BEVERLY ESPINOZA, individually and as heirs-at-law of ARTHUR ESPINOZA	)	
	)	
Respondents.	)	

RESPONSE TO PETITION FOR WRIT OF CERTIORARI UNDER SUPREME COURT RULE 15

OPINIONS AND JUDGMENTS BELOW

The trial court denied Petitioner's Motion for Summary Judgment based on his claim of "qualified immunity"; the Colorado Court of Appeals declined to review denial of summary judgment based on qualified immunity, prior to trial. The Colorado Supreme Court denied certiorari.

JURISDICTION

28 U.S.C. § 1257 and Mitchell v. Forsyth, 472 U.S. 511, 106 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

STATUTES AND CONSTITUTIONAL PROVISIONS

Respondents are satisfied with Petitioner's presentation.

STATEMENT OF THE CASE

Arthur Espinoza was shot to death by Petitioner Neil, while drunk and helpless on July 30, 1977. This § 1983 suit, was brought by his children in 1977. Summary judgment was initially granted by the trial judge in reliance on Jones v. Hildebrant, 191 Colo. 550 P.2d 339 (1976). Thereafter, in Espinoza v. O'Dell, 633 P.2d 455 (Colo. 1981), the Colorado Supreme Court reversed Jones, holding that the federal civil rights of Arthur Espinoza's children did not "merge" with a state wrongful death claim, remanding the case for trial. This Honorable Court granted certiorari, but later dismissed for lack of final judgment. O'Dell v. Espinoza, 456 U.S. 430, 102 S.Ct. 1865, 72 L.Ed.2d 237 (1982).

The case was then returned to state court, and went to trial in April, 1985. Retrial resulted in a verdict against Petitioner, with a hung jury on the claims against the other remaining defendant, the City and County of Denver. The verdict against Petitioner was reversed in Neil v. Espinoza, 747 P.2d 1257 (Colo. 1987), because of an irregularity in the return of the verdict.

Upon remand, the case was set for retrial. Prior to trial, Petitioner moved for summary judgment on various and sundry grounds, one of which was a claim of "qualified immunity". In seeking summary judgment, Petitioner claimed that the facts as established by the first trial made him "immune" from suit, that he could be held liable neither to Arthur Espinoza's estate nor

to his children for shooting Espinoza to death.

The trial court denied summary judgment, holding that there were disputed facts relative to the issue of immunity. The trial court granted a stay, however, permitting immediate appeal of the qualified immunity issue, relying on this Court's decision in Mitchell v. Forsyth, supra, and a Tenth Circuit decision, Jones v. City and County of Denver, 854 F.2d 1206 (10th Cir. 1988).

The Colorado Court of Appeals dismissed the appeal, for lack of a "final judgment", disregarding both Mitchell and Jones. The Colorado Supreme Court declined certiorari. Certiorari has been sought in this Court, seeking not just a ruling that denials of "qualified immunity" in 42 U.S.C. § 1983 cases are immediately appealable but also a ruling that, in 1977, a police officer should not be held to have had knowledge that shooting an unarmed man to death might be in violation of that man's constitutional rights, and those of his children.

SUMMARY OF ARGUMENT

Respondents join in the request that this Court grant certiorari, upon a limited issue, to resolve the troubling and persistent claim now "in vogue", at least in the Tenth Circuit, that police officer defendants in federal civil rights shooting cases should be entitled to automatic pre-trial appeals from denials of summary judgment on "qualified immunity" grounds, in all 42 U.S.C. § 1983 cases. Respondents hope that the Court will grant certiorari, and hold that such civil right defendants do not have right to an interlocutory appeal, prior to trial, at

least where, as here, the claim of "qualified immunity" is clearly meritless.

Respondents also believe that if certiorari is granted on other issues, that this Court should hold that, as of July 30, 1977, the right to life was "adequately established" as a matter of federal constitutional law so as to put an individual police officer on notice that the use of deadly force in shooting an unarmed, intoxicated man to death, was actionable.

ARGUMENT

Respondents join in the request that this Court grant Certiorari, to decide the immediate appealability of claims of qualified immunity from suit under 42 U.S.C. § 1983, upon denial of summary judgment. Both Mitchell v. Forsyth, supra, and Jones v. City and County of Denver, supra, appear to hold that a trial judge's denial of qualified immunity, at least "to the extent that it turns on an issue of law", is an appealable final decision under 28 U.S.C. § 1291, as a legally supportable claim of immunity is the right "not to stand trial" at all. Mitchell v. Forsyth, supra.

Mitchell involved federal executive acts, not the conduct of a municipality's police force. In Jones, however, the Tenth Circuit extended Mitchell to permit pre-trial appeal of denial of summary judgment sought on "qualified immunity" grounds even though it involved claims made against a police officer, as opposed to allegations made against presidential cabinet members. Thus, although Mitchell can easily be distinguished as involving

federal executive authority, nevertheless the Tenth Circuit's decision in Jones appears to give police officers the right to a pre-trial appeal on qualified immunity, no matter what the facts, in all 42 U.S.C. § 1983 cases.

The Tenth Circuit's holding in Jones has had the effect of creating for police officers within the Tenth Circuit an automatic right to interlocutory appeal on "qualified immunity", no matter what the facts, and no matter how indefensible the claim of immunity. Such a procedure is both duplicative and unlawful, inconsistent with the purposes of § 1983.

Obviously, giving all police officer defendants a right to an interlocutory appeal on immunity in police shooting cases has the effect of squandering our Courts' limited resources. Why should police officers be given a right that no other litigant has, a right to raise a defense, and then litigate it through appeal, without ever having to stand trial, even where, as here, no factual basis exists for a claim of "qualified immunity"? This anomalous situation is hardly conducive to judicial economy.

Moreover, the state of the law as it now exists in the Tenth Circuit is utterly inconsistent "in both purpose and effect" with the remedial objectives of the federal civil rights laws. See Felder v. Casey, 487 U.S. ___, 108 S.Ct. ___, 101 L.Ed.2d 123 (1988). Unless this Court intervenes, all 42 U.S.C. § 1983 cases filed within the confines of the Tenth Circuit will continue to first be subjected to an interlocutory appeal on the issue of

"qualified immunity", following denial of summary judgment, before any civil rights litigant can get his or her case to trial. This is, of course, wholly at odds with what this Court has held to be "the dominant characteristic of civil right actions: they belong in court." See Burnett v. Grattan, 468 U.S. 42, 104 S.Ct. 2924, 82 L.Ed.2d 36 (1984). See also Felder v. Casey, supra.

Respondents would strongly urge this Court to grant certiorari. Numerous Tenth Circuit litigants are being forced tc defend meritless "qualified immunity" appeals, as a condition precedent to trial in 42 U.S.C. § 1983 cases. The factual circumstances as revealed in this appeal certainly illustrate how this procedure is being utilized to the disadvantage of civil rights claimants in particular, and to the court system in general.

In this case, the position of the Petitioner is that he could not have known in July 30, 1977, that his shooting an unarmed man to death as that man lay completely intoxicated in a public park would subject him, as a police officer of a municipality within the state of Colorado, to potential suit for damages from the estate of the decedent and his children. Indeed, the gist of the claim for summary judgment is the assertion that Petitioner Neil acted in an "objectively reasonable" manner in shooting Arthur Espinoza to death. Reference to the facts of the case as established by trial, however, illustrate how insupportable the claim of "qualified

immunity" was in this case, why the trial court had no choice but to deny summary judgment on that defense, and why the creation of a right to an immediate appeal of such denial is completely inconsistent with the remedial purposes of 42 U.S.C. § 1983.

Here, the facts revealed that the fatal shot was fired by Petitioner Neil from approximately 10 feet away, despite the fact that Neil saw no gun in Arthur Espinoza's hand at the time of the shooting, a shooting which was designed to prevent Espinoza from "pulling his hand out of his pants". Citizen eyewitnesses testified that Neil and two other officers approached Arthur Espinoza and another man without saying anything, that the two men were lying on the ground, did nothing at all to provoke the shooting, and were so intoxicated that "they didn't know what was going on." To these eyewitnesses, the shootings were "cold blooded murders", nothing less.

It is not surprising that the case that was previously submitted to a jury for resolution. Here, the trial court properly denied summary judgment on the claim of "qualified immunity". Indeed, to even argue that Petitioner Neil was "immune" from liability under § 1983 for shooting an unarmed intoxicated citizen to death is ridiculous, wholly at odds with the legislative history of § 1983, which was enacted to remedy abuses under "color of state law" occurring after the Civil War. The credibility of Petitioner Neil and indeed, the credibility of all of the eyewitnesses, is part and parcel of the entitlement to trial, effectively precluding summary judgment even where, as

here, a claim of "qualified immunity" is made. See Graham v. Connor, 490 U.S. ___ n.12, 109 S.Ct. ___, 104 L.Ed.2d 443 (1989). Only a jury could properly decide if Petitioner Neil acted with "objective reasonableness" under the circumstances of this case. Contrast Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985).

Although Respondents believe that, on the merits, the claim of "qualified immunity" as made in this case is totally groundless, nevertheless Respondents join in requesting that this Court grant certiorari. As was argued by Petitioner, state courts have split on the immediate appealability of denials of immunity, prior to trial. The impact of Jones v. City and County of Denver upon civil right litigants within the Tenth Circuit cannot be over-emphasized, however, as without intervention from this Court, civil right litigants will and have been subjected, on a routine basis, to interlocutory appeals on specious "qualified immunity" grounds, whenever it is alleged that a police officer's actions violated 42 U.S.C. § 1983. A definitive ruling by this Court concerning the circumstances under which defenses of "qualified immunity" are properly subjected to pre-trial appeals as a matter of right is certainly necessary to protect civil rights litigants, at least those injured by state action within the Tenth Circuit.

Petitioner urges that, in attempting to create "qualified immunity" for Petitioner Neil, recognition of a constitutionally protected right of association has occurred only belatedly, so as

to render Respondents in this case remediless to redress the unconscionable murder of Arthur Espinoza in 1977. This focus, however, is entirely misplaced: indisputably Arthur Espinoza had a right not to be unlawfully shot, to not be killed through the unreasonable use of force by a state officer, in violation of the United States Constitution. The fact that his children can now recover for his death, as opposed to Arthur Espinoza himself, does not give rise to immunity; the right to life has now been established for over two centuries.

The rights of Arthur Espinoza's children to associate with their father was not created in Espinoza v. O'Dell, supra, but rather, derive from the United States Constitution. Nor was Espinoza v. O'Dell, supra, the first case holding that family members have a right to recover under 42 U.S.C. § 1983 for wrongful killings under color of state law. See, e.g., Brazier v. Cherry, 203 F.2d 401 (5th Cir. 1961), cert. denied, 368 U.S. 921, 82 S.Ct. 243, 7 L.Ed.2d 136; Hall v. Wooten, 506 F.2d 564 (6th Cir. 1974); Beard v. Robinson, 563 F.2d 331 (7th Cir. 1977); Perkins v. Salafia, 338 F. Supp. 1325 (D. Conn. 1972). See also Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974).

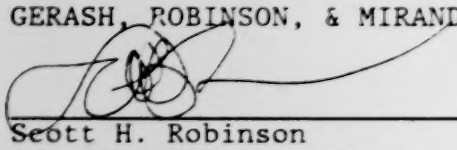
No basis exists for the claim of "qualified immunity" raised by Petitioner below, and hereafter on appeal. Manifestly, this issue could not have been resolved in favor of Petitioner on motion for summary judgment. However, Respondents join in the request for certiorari, for the reasons previously stated.

CONCLUSION

Respondents join in the request that this Court grant certiorari, to ask this Court to hold that civil right litigants cannot be automatically subjected to meritless appeals of "qualified immunity" claims in 42 U.S.C. § 1983 cases, and to hold that summary judgment was properly denied in this case.

Respectfully submitted,

GERASH, ROBINSON, & MIRANDA, P.C.



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